Case No. 87-526

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF OF AMICI CURIAE, THE STATES OF CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, MICHIGAN, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, WYOMING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does it violate federal policy for a state to apply its notice of claim statute as a condition precedent to suit in state-court actions brought under 42 U.S.C. § 1983?

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INTEREST OF THE AMICI CURIAE

The states are interested in the outcome of this case for two principal reasons. First, as sovereign states they have an interest in allocating their judicial resources, and in controlling the conditions under which their courts can be used, to the fullest extent consistent with the Constitution. Second, the majority require a notice as a condition precedent to an action against the states, municipalities, or other political subdivisions, and their officers, agents, and employes. The ubiquity of state reliance on these notice statutes in part led Congress to adopt one for the District of Columbia. See Brown v. United States, 742 F.2d 1498, 1514 (D.C. Cir. 1984) (Bork, J., dissenting), cert. denied, 471 U.S. 1073 (1985).

This case threatens the states' control over the management of their courts. The states support the respondents.

SUMMARY OF ARGUMENT

Federalism requires use of state laws, if not inconsistent with federal policy, including state laws regarding procedures in state courts.

This principle applies to actions under 42 U.S.C. § 1983 (1981). For example, preclusion and abstention principles apply to § 1983 actions out of deference to state rules and state courts. Congress instructed federal courts to borrow from state law in § 1983 actions.

By enacting § 1983 Congress meant to supplement state remedies, not to supplant state court procedures.

A notice rule is not inconsistent with federal § 1983 policies. Those policies are to compensate victims whose federal rights are violated, to deter wrongdoers, and to provide a supplemental federal remedy. Requiring a notice does not itself disturb the substantive rights to be compensated and to enjoin further wrongdoing. And the plaintiff remains free to choose the supplemental federal forum.

The public benefits by the opportunity for early investigation and resolution. The plaintiff benefits by the opportunity for resolution and by a defendant made collectible by the state's indemnity program.

The notice statute applies to any lawsuit. It is neutral as between state and federal interests.

Since the notice requirement comports with procedural due process for purposes of having an adequate post-deprivation remedy, it obviously is not inconsistent with § 1983's policy to remedy procedural due process violations.

ARGUMENT

IT DOES NOT VIOLATE FEDERAL POLICY FOR A STATE TO APPLY ITS NOTICE OF CLAIM STATUTE AS A CONDITION PRECEDENT TO SUIT IN STATE COURT ACTIONS BROUGHT UNDER 42 U.S.C. § 1983.

A. Federalism requires the use of state law if not inconsistent with federal policies.

Federalism requires deference to the state legislatures. State law must be followed, except as otherwise provided by the Constitution or Congress. "[T]he law to be applied in any case is the law of

the state," absent such exception. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1937).

This principle of federalism is embedded in the tenth amendment. The states retain all attributes of sovereignty, except those the Constitution transfers to the federal government. Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 549 (1985). While the Constitution vests in Congress the power to prescribe the basic procedural scheme under which claims may be heard in federal courts, Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1982), it reserves to the states the power to prescribe the procedural scheme in state courts. To override this state prerogative "is an invasion of the authority of the state and, to that

extent, a denial of its independence." Erie R. Co. v. Tompkins, 304 U.S. at 79.

This principle of federalism controls § 1983 actions. There is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975). It does not matter that § 1983 is a uniquely federal remedy: the plaintiff may not continue an action in disregard of state law. Robertson v. Wegmann, 436 U.S. 584, 593 (1978). To illustrate, despite the supplemental nature of a § 1983 action, state court decisions are entitled to collateral estoppel and res judicata effect in federal courts, even where a state court erroneously interprets the Constitution. Allen v. McCurry, 449 U.S. 90, 89-99, 101 (1980). See also Parson

Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 106 S. Ct. 768 (1986) (federal court cannot enjoin state proceeding even if state court misunderstands preclusive effect of federal court decision). Similarly, in abstention law, federalism disfavors interfering with state court judgments because of a state's keen interest in protecting the integrity of its judicial system. Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987).

Congress did not intend § 1983 to displace state authority over its courts. Congress was adding to the jurisdiction of federal courts; it was not subtracting from state courts' jurisdiction. Allen v. McCurry, 449 U.S. 90, 99 (1980). In fact, Congress had given up trusting the states to protect constitutional rights: § 1983 was intended to supplement, and be

independent of, state remedies, if any. See Wilson v. Garcia, 471 U.S. 261, 279 (1985); Patsy v. Florida Board of Regents, 457 U.S. 496, 503, 505-06 (1982); Monroe v. Pape, 365 U.S. 167, 173 (1961). Section 1983, then, was anything but an attempt by Congress to control the operation of state courts.

In fact, Congress subordinated § 1983 actions to this principle of federalism by enacting 42 U.S.C. § 1988 (1981),[1] whereby Congress "quite clearly

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[1]Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

(Footnote Continued)

instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983. Robertson v. Wegmann, 436 U.S. 584, 593 (1978). See also Wilson v. Garcia, 471 U.S. 261, 266 (1985) (statute of limitations); Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975) (statute of limitations); Chardon v. Soto, 462 U.S. 650, 657 (1983) (commencement of limitations period). See generally 28 U.S.C. § 1652 (1966) (Rules of Decision Act).

Petitioner asserts there is no federal "deficiency" for a notice rule to

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> modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts. . . .

fill. Even if petitioner is correct, but see Brown v. United States, 742 F.2d 1498, 1512-14 (D.C. Cir. 1984) (Bork, J., dissenting), a state's interest in managing its court system still must be weighed against any competing federal interest. Petitioner might be correct if the question presented concerned whether federal courts must follow the state's notice rule. But it is an entirely different question, and the only one presented here, whether state courts may follow the state's notice rule. Therefore, it is less significant whether a state notice rule fills a § 1988 "deficiency" than to appreciate § 1988's call to federalism in § 1983 actions. See Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. Pa. L. Rev. 499, 542 n.142 (January 1980).

State court rules must yield only when "'inconsistent with the Constitution and laws of the United States.'" Robertson v. Wegmann, 436 U.S. 584, 588 (1978). If not inconsistent, state rules are incorporated into federal law. Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980). "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes a plaintiff to lose the litigation." Robertson v. Wegmann, 436 U.S. at 593.

B. The notice rule is not inconsistent with the federal policies.

The principal policies embodied in § 1983 are deterrence and compensation. Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). Congress meant to ensure that individuals whose federal rights are violated may recover damages

or secure injunctive relief. See Mitchum v. Foster, 407 U.S. 225, 239 (1972). Congress also intended to provide a remedy that is supplemental and independently enforceable in federal court, whether or not it duplicates a parallel state remedy. Wilson v. Garcia, 471 U.S. 261, 279 (1985), citing Monroe v. Pape, 365 U.S. 167, 173 (1961).

The notice rule is not inconsistent with the policies of compensation and deterrence. Plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by giving notice of their claim. See Cardo v. Lakeland Cent. School Dist., 592 F. Supp. 765, 773 (S.D. N.Y. 1984). Obviously, the notice requirement for state court does not burden the plaintiff's choice of federal court.

There is a public benefit. Notice "afford[s] the municipality an opportunity to compromise the claim and settle it without a costly and expensive lawsuit." Gutter v. Seamandel, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981); Patterman v. Whitewater, 32 Wis. 2d 350, 145 N.W.2d 705 (1966). Accord, Indiana Dept. of Public Welfare v. Clark, 478 N.E.2d 699, 702-03 (Ind. Ct. App. 1985), cert. denied 106 S. Ct. 2893 (1986); Mills v. County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 458 (N.Y. Ct. App.), cert. denied, 464 U.S. 1018 (1983). See also 423 S. Salina Street v. City of Syracuse, 68 N.Y.2d 474; 510 N.Y.S.2d 507, 503 N.E.2d 63 (N.Y. 1986), appeal dismissed, 107 S. Ct. 1880 (1987) (upholding the notice of claim requirement in a state court action brought under § 1983). Early resolution

of claims benefits both the claimant and the state. These public purposes are not "antithetical to the policy underlying the civil rights laws." Mills v. County of Monroe, 451 N.E.2d at 457.

Giving notice can also advance the objectives of civil rights law. Wisconsin, for example, provides a collectible defendant through the indemnity statute which is the quid pro quo for notice. See sec. 895.46, Wis. Stats; Doe v. Ellis, 103 Wis. 2d 581, 589, 309 N.W.2d 375, 378 (Ct. App. 1981). This Court already has approved as consistent with § 1983 policies the policy to spare the public employe from the worry of personal loss that these indemnity programs serve. See, e.g., Pierson v. Ray, 386 U.S. 547, 555 (1967) (good faith immunity defense saves the police officer, who cannot predict the

future course of constitutional law, from being "mulcted in damages"). See also, Imbler v. Pachtman, 424 U.S. 409, 423-24 (1976) (prosecutors have absolute immunity to assure that their decision-making is unimpaired by the threat of civil suit, despite the broad remedial purposes of § 1983). Finally, the notice rule advances civil rights objectives by enabling the public employer to take prompt remedial action, such as by removing offending employes, repairing procedural flaws, etc.

Moreover, the notice rule meets this Court's concern that a state rule not discriminate against federal claims. See Wilson v. Garcia, 471 U.S. 261, 269 (1985). The statute applies to any cause of action, state or federal. Cf. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 52,

357 N.W.2d 548 (1984) ("any cause of action").

Since the notice statute meets procedural due process standards, it cannot be inconsistent with § 1983, whose purpose is to protect against due process violations. A § 1983 action will not lie for a due process violation, if the state provides meaningful post-deprivation relief. Hudson v. Palmer, 468 U.S. 517, 533 (1984). A state's post-deprivation remedy is adequate even if (a) it provides only for an action against the state as opposed to individuals; (b) it does not allow for punitive damages; and (c) there is no right to a trial by jury. Parratt v. Taylor, 451 U.S. 527, 543-44 (1981). Obviously the notice statute would not make the remedial scheme inadequate. For the state may impose reasonable procedural requirements

so long as the opportunity to sue is meaningful, Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), and Wisconsin's notice statute meets this standard. See Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985), cert. denied, 106 S. Ct. 1644 (1986). It would be strange if the notice statute comports with fourteenth amendment due process for Hudson v. Palmer purposes but is inconsistent with § 1983 generally.

C. Petitioner's cases are inapposite.

Notwithstanding the tenth amendment, petitioner avers, Congress can override state procedural rules. Amici concede the point arguendo. In each of the examples petitioner cites, however, this Court located a conflict between state and federal rules. For example, in Garrett v. Moore-McCormack Co., 317 U.S.

239 (1942), state policy on burden of proof had to yield to a contrary federal rule. Similarly, the state rule of pleading struck in Brown v. Western Railway of Alabama, 338 U.S. 294 (1949), encroached on a substantive federal right.

Thus, one can agree with petitioner that a state procedural rule is not ipso facto insulated from the supremacy of a conflicting federal policy, but still prevail on the argument that petitioner has failed to show any conflict here. Surely, there is no inherent inconsistency between the right to sue over a federal claim and the duty to give notice beforehand.

Even petitioner agrees that, generally speaking, state court rules of procedure and evidence apply to federal claims (petitioner's brief at 35-36).

Petitioner then explains away the rule of Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211 (1916), that upheld a state rule permitting non-unanimous jury verdicts, as having turned on congressional intent in that situation (petitioner's brief at 18 n.13). Exactly! Here, there is no evidence of congressional intent to supplant state court notice rules: not a scintilla.

Petitioner's reliance on El Paso & N. E. R. Co. v. Gutierrez, 215 U.S. 87 (1909), turns on itself. This Court held that Congress' exercise of plenary control over the territories superceded a local notice rule. But that case did not involve the prerogatives of sovereign states. Indeed, even as to territories, this Court said a notice statute ordinarily would apply to a federal claim, absent a congressional override.

215 U.S. at 92-93, 96-97. Here, there is no congressional override.

Petitioner also errs in relying on Maine v. Thiboutot, 448 U.S. 1, 11 (1980), wherein this Court held that attorney's fees are equally available in state courts lest claimants face financial disincentives in state courts. Here, however, a § 1983 claimant does not face a financial disincentive, for § 1988 attorney's fees are recoverable and there are no recovery limits. Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 298, 309, 340 N.W.2d 704 (1983). Besides, it is not essential that plaintiff's state remedies be identical to the § 1983 federal remedies. See Parratt v. Taylor, 451 U.S. 527, 544 (1981).

Petitioner also misreads Maine v. Thiboutot as to federalism, suggesting

that since there is no notice rule in federal courts there can be none in state courts lest plaintiffs opt for federal courts. Maine v. Thiboutot, however, was concerned only to avoid a rule that would chase plaintiffs away from state courts. Hence, § 1988 attorney's fees had to be regarded as integral to any § 1983 suit. But that concern for federalism does not warrant the leap that either Congress or this Court meant to invalidate state court notice rules. In fact, it turns federalism on its head to strike state court rules in state court actions. If they are to be struck, the source is the Constitution or an act of Congress, not the doctrine of federalism.

Petitioner contends that the notice statute is but a form of sovereign immunity, thereby inconsistent with § 1983 policies. To the contrary. Even

if the notice statute is a form of immunity, nothing in § 1983 was intended to overcome a sovereign's immunity as enshrined in the eleventh amendment. Quern v. Jordan, 440 U.S. 332, 345 (1979). Moreover, a notice rule is no more a form of immunity than is a statute of limitations: if complied with the plaintiff may proceed against the defendant; if not complied with the plaintiff may not proceed whether or not the defendant otherwise is immune.

Nothing in Wilson v. Garcia, 471 U.S. 261 (1985), invalidates Wisconsin's rule of decision. The Court adopted personal injury statutes of limitations for § 1983 actions, abjuring statutes for actions against public officials. In doing so, however, the Court focused on the intent of Congress and the nature of a § 1983 action in picking the closest

state analogue; the Court was not ascribing to Congress the intent to upset federalism's deferral to the states in choosing procedures for their courts.

Lastly, the petitioner's reliance on Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), is inapposite. Immediate access to courts is no more imperilled by a notice rule than by a filing fee.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

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